IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.43 of 2002

Reserved on.27.4.2007

Decided on-1.6.2007

Soma Devi **…Petitioner.**

Versus

Municipal Council & another **…Respondents**

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*. No*

For the petitioner : **Mr. Rahul Mahajan, Advocate**

For the respondent No.1 **Mr. Neeraj Kumar Sharma, Advocate.**

Rajiv Sharma, J.

This petition is directed against the judgment of learned District Judge, Chamba, District Chamba, H.P. dated 20.10.2001.

The brief facts necessary for the adjudication of this petition are that the respondent No.1-Council had received complaint dated 1.4.1999 and 6.4.1999 from the Engineering and Sanitation sections to the effect that the petitioner is engaged in unauthorized construction on Kathlig Road Dalhousie without prior permission under the relevant provisions of the H.P. Municipal Act, 1994. The notice was issued to the petitioner under section 211 (1) (a) of the H.P. Municipal Act on 1.5.1999 to stop the construction. The petitioner did not stop the unauthorized construction and thereafter on the basis of written report dated 13.4.2000, the respondent-council served the petitioner with a notice under section 211

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? No

(1) (a) of the Municipal Act, 1994 on 24.4.2000. The matter thereafter was placed before the House of the Municipal Council on 31.5.2000 and subsequently on 18.8.2000. The petitioner was served with a notice on 22.9.2000 after receipt of complaint from the Engineering section of the respondent-council on 21.9.2000 asking the petitioner to stop the unauthorized construction. Ultimately, the matter was placed before the House of the Council on 27.6.2001 whereby it was resolved to demolish the unauthorized construction raised by the petitioner. The Executive Officer of the Council issued notice dated 5th July, 2001 to the petitioner to demolish the unauthorized construction within 7 days from the receipt of orders. The petitioner feeling aggrieved with the order dated 5.7.2001 filed appeal under section 212 (1) of the H.P. Municipal Act, 1994 before the learned District Judge, Chamba on 12.7.2001. The learned District Judge has dismissed the appeal on 20.10.2001.

Mr. Rahul Mahan, Advocate appearing on behalf of the petitioner has submitted that the petitioner had sought requisite permission to raise the construction and the notices have been issued against the petitioner without taking this fact into consideration.

Mr. Neeraj Kumar Sharma, Advocate appearing on behalf of the respondents has refuted the submissions made by the counsel for the petitioner.

I have heard the parties and perused the record.

The petitioner had been issued first show cause notice by the council on 1.5.1999 followed by second notice dated 24.4.2000 under section 211 (1) (a) of the Municipal Act, 1994. Through these notices, the petitioner was directed to stop the unauthorized construction and ultimately the last notice was issued to the petitioner on 22.9.2000 and when the petitioner did not stop the unauthorized construction, the matter

was placed before the House of the Council on 27.6.2001 and consequently order dated 5.7.2001 was issued against the petitioner.

The petitioner had not sought any permission as per the provisions of the Municipal Council Act, 1994 and the Bye-Laws framed thereunder and it appears from the record that Sh. Rajeev Raj son of the petitioner had requested for ex-post facto sanction from the Council without enclosing the revenue record showing the ownership of land. Mr. Neeraj Kumar Sharma, Advocate has vehemently argued that the unauthorized construction has been raised by the petitioner adjacent to the old building on the Government land. Mr. Neeraj Kumar Sharma has further refuted the submission made by the petitioner that the petitioner had ever requested the respondent to allow her to put CGI sheets on the roof.

There is no infirmity in the order passed by the Executive Officer of the respondent-Council dated 5th July, 2001. The judgment passed by the learned District Judge is after considering the rival submissions of the parties. The learned District Judge has extensively considered the various provisions of the H.P. Municipal Act, 1994 and on that basis he has come to a just conclusion that the order dated 5.7.2001 requires no interference. There is neither any jurisdictional error nor procedural irregularity in the judgment passed by the learned District Judge on 20.10.2001.

The other contention raised by Mr. Rahul Mahajan, Advocate is that the similarly situated persons, who have raised the unauthorized construction have been let off by the Council is also not tenable in view of the specific stand taken by the Council in its reply. The gist of the reply with regard to allegations contained in para 5 of the petition are that the Council has only compounded the matters where the deviation was less than 10%. The petitioner could also not be permitted to take advantage of the orders passed in the cases of the persons mentioned in para 5 of the

petition. The petitioner can only claim equality under Article 14 of the Constitution of India on the basis of positive averments and not negative averments.

The learned District Judge has examined the record and the findings recorded by him will not be interfered with by this Court while exercising the jurisdiction under Article 226/227 of the Constitution of India.

The Hon'ble Supreme Court in ***M.I. Builders Pvt. Ltd. V. Radhey Shyam Sahu*** (1999*) 6* SCC 464 has held that the Court should order demolition of such construction even though builder has invested considerable amount. Their Lordships of the Hon'ble Supreme Court have opined as under:

> **"No consideration should be shown to the builder or any other person where construction is unauthorized. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorized construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles."**

The upshot of the above discussion is that the petitioner had raised unauthorized construction without seeking prior permission of the Municipal Council as per the provisions of the H.P. Municipal Act, 1994 and the Building Bye-Laws framed thereunder.

Accordingly the writ petition is dismissed with no order as to costs and the interim order dated 9.1.2001 is vacated

(Rajiv Sharma), Judge

June 1, 2007
Awasthi